Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of	)	
	)	
Appropriate Framework for Broadband Access to the Internet over Wireline Facilities	)	CC Docket No. 02-33
	)	
Universal Service Obligations of Broadband Providers	)	
	)	
Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services: 1998 Biennial Regulatory Review – Review of Computer III and ONA Safeguards and Requirements	)	CC Docket Nos. 95-20, 98-10

COMMENTS OF NEWSOUTH COMMUNICATIONS

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COMMENTS OF NEWSOUTH COMMUNICATIONS

NewSouth Communications ("NewSouth") hereby files these comments in response to the Notice of Proposed Rulemaking in the above-captioned proceeding.[1/]

I. INTRODUCTION AND SUMMARY

In this proceeding, the Commission addresses the appropriate regulatory classification and regulatory framework for high-speed Internet access services provided by a wireline carrier over its own facilities. NewSouth's primary interest in this proceeding is to ensure that the Commission's classification scheme does not eliminate the ability of NewSouth and similarly situated carriers to provide services, including advanced services, to its customers using unbundled network elements ("UNEs"). NewSouth provides high-speed Internet access services to small and medium-sized business in competition with the incumbent local exchange carriers ("ILECs"). In order

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1/ *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, et al.*, CC Docket Nos. 02-33, 95-20, 98-10, *Notice of Proposed Rulemaking*, 17 FCC Rcd 3019 (2002) ("*Notice*").

to provide these services to its customers, NewSouth must utilize the ILEC's last mile facilities. Currently, NewSouth obtains these facilities as UNEs, primarily DS1 unbundled loops and EELs. The regulatory classifications at issue in this proceeding have potentially significant and profound effects on the incumbent LEC's continuing obligation to provide these facilities as UNEs. NewSouth, therefore has a keen interest in this proceeding.[2/]

NewSouth agrees with the Commission's tentative conclusion that Internet access services provided over a carrier's own high-speed facilities constitutes an information service. This conclusion is consistent with Commission precedent and the industry's treatment of those services. Conversely, the Commission's tentative conclusion that the transmission component of retail wireline broadband Internet access services is not a telecommunications service is a dramatic and unwarranted departure of well-settled precedent. Even more disturbing is the Commission's unexplained request for comment on whether it should reverse its previous explicit holdings that stand-alone broadband services – that is broadband services not bundled with Internet access service – are telecommunications services.

As explained below, the Commission consistently and correctly has held that advanced services, such as DSL service, are telecommunications services, whether bundled with the carrier's Internet access service or sold on a stand-alone basis. The Commission has proffered no explanation as to why its previous *legal* conclusions

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[2/] NewSouth has also filed comments in the *Triennial Review* proceeding explaining that it is impaired in its ability to provide the services it seeks to offer without access to UNEs. *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, et al.*, CC Docket Nos. 01-338, 96-98, 98-147, Comments of NewSouth Communications (filed Apr. 5, 2002) ("NewSouth Triennial Review Comments").

concerning the application of the 1996 Act's definitions to advanced services were incorrect. As a matter of sound public policy, the Commission should ensure that carriers such as NewSouth may continue to have access those UNEs for which impairment has been demonstrated when they provide a bundle of voice, data and Internet access services to their customers.

II. NEWSOUTH'S SERVICES

NewSouth offers a bundled package of local and long distance voice service, data service and Internet access service to small and medium-sized businesses in Tier I through Tier IV markets in the Southeast. All of these service are provided over a single facility – a DS 1 loop – currently obtained as a UNE loop or EEL from the ILEC. On average, NewSouth's customers obtaining service over a DS1 loop order 17 "lines" or channels, some for voice, some for data and some for high-speed Internet access. NewSouth has invested hundreds of millions of dollars in state-of-the-art digital and packet switching technology, collocation arrangements, customer premises equipment, and back office customer care systems in order to provide these services. Through this investment, NewSouth is bringing advanced services to a market segment which was not obtaining these services from the ILEC. Notably, NewSouth upgrades from analog service to broadband, digital services roughly 90% of the customers it wins from the ILEC.

NewSouth explained in its *Triennial Review* comments that it is impaired in its ability to provide these services to its customers without continuing, nondiscriminatory access to UNEs, particulary DS1 loops or EELs.[3/] NewSouth believes that the case for

[3/] NewSouth Triennial Review Comments at 13-25.

impairment without access to these network elements is compelling and that the Commission will continue to require access. The danger of this proceeding is that the Commission will conclude that NewSouth and similarly situated carriers are impaired without access to DS1 loops or other UNEs, yet ILECs will be excused, or ILECs will deem themselves excused, from providing such access based on the definitions addressed in this proceeding.

III. THE SCOPE OF THIS PROCEEDING IS POTENTIALLY UNBOUNDED.

The Commission states that the scope of this proceeding is limited to broadband Internet access services offered by entities using the traditional telephone platform. This proceeding is intended to be the "functional equivalent" of the *Cable Modem NOI*. Notice ¶ 6. In the *Cable Modem Order*,[4/] the Commission addressed the regulatory classification of high-speed Internet access over cable facilities to *residential* consumers. The Commission specifically did not address high-speed Internet access over cable facilities provided to businesses, including small businesses.[5/] Thus, in order to maintain functional equivalency between the proceedings, this proceeding should be limited to the provision of high-speed Internet access services to residential customers.

Unfortunately, the Notice does not appear to so limit this proceeding and it is not clear that such a limitation can be achieved given that the Commission has chosen the incredibly blunt instrument of revising legal definitions to reach policy-based results. The policy that the Commission appears to want to achieve is "regulatory parity" across various platforms that provide broadband Internet access, particularly between cable-

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[4/] *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities et al.,* GN Docket No. 00-185*, et al., Declaratory Ruling and Notice of Proposed Rulemaking*, 17 FCC Rcd 4798 (2002) ("*Cable Modem Order*").

based broadband Internet access services and wireline-based broadband Internet access service.[6/] To the extent competition exists among these platforms, the competition is limited to residential consumers.[7/] In order to reach "regulatory parity" for residential consumers, however, the Commission risks destroying what little competition has developed for business consumers, particularly the smaller business customer that NewSouth targets. If the Commission determines, as it has tentatively concluded, that carrier-provided Internet access service is an integrated offering with no underlying telecommunications service -- or that stand-alone high speed transmission service such as DSL is not a telecommunications service -- that conclusion would appear to apply whether the customer is a residential customer or a business customer. The consequence of that conclusion (whether intended or not) may be to preclude competing carriers from obtaining access to underlying network elements as UNEs, even if the carriers are impaired without access to such UNEs. The ultimate consequence of the Commission's actions in this proceeding may thus be to harm competition for small and medium-sized business customers.

IV. THE COMMISSION'S PROPOSED REGULATORY CLASSIFICATIONS

A. Finding that Internet Access Services Is an Information Service Is Consistent with Precedent.

The Commission tentatively concludes that Internet access service provided by entities that own (and utilize) their own transmission facilities is an information service. This tentative conclusion is consistent with Commission precedent and confirms the

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5/ *Cable Modem Order*, n.5.

6/ By wireline, the Commission means over the existing and future infrastructure of the traditional telephone network. *Notice*, n.1.

7/ The extent of this competition is not uniform across all geographic areas and where it exists, the competition consists largely of a duopoly.

treatment that BOCs themselves have given to their provision of Internet access service over their own facilities.

The Commission and the incumbent LECs have consistently treated their provision of Internet access service, utilizing their own transmission facilities, as an information service. As early as 1996, the BOCs filed CEI plans with the Commission for their provision of Internet access services.[8/] Under the *Computer III* regime, BOCs that provide information services on an integrated basis must file CEI plans with the Commission detailing how unaffiliated ISPs, including Internet Service Providers, will obtain access to basic underlying telecommunications services that the BOC uses in the provision of its information service. The Commission treated BOC-provided Internet access services just like any other BOC-provided information service in its *Computer III Remand Order*. The Commission affirmed that, even in today's telecommunications market, BOC "compliance with the Commission's CEI requirements remains conducive to the operation of a fair and competitive market for information services."[9/]

[8/] *See, e.g., Bell Atlantic Telephone Companies Offer of Comparable Efficient Interconnection to Providers of Internet Access Services*, CC Docket No. 96-09, *Order*, 11 FCC Rcd 6919 (1996) ("*CEI Plan Order*"). *See also, Implementation of the Non-Accounting Safeguards of Section 271 and 272 of the Communications Act of 1934, as amended*, CC Docket No. 96-149, *First Report and Order and Further Notice of Proposed Rulemaking*, 11 FCC Rcd 21905, ¶ 125 (1996) (subsequent history omitted) ("*Non-Accounting Safeguards Order*") (identifying filed CEI plans).

[9/] *Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services, et al.*, CC Docket Nos. 95-20, 98-10, *Report and Order*, 14 FCC Rcd 4289, ¶ 11 (1999) ("*Computer III Remand Order*"). The Commission also treated BOC-provided high-speed Internet access service as an information service in the *Advanced Services Order*. *Deployment of Wireline Services Offering Advanced Telecommunications Capability, et al.*, CC Docket Nos. 98-147, *et al*., *Memorandum Opinion and Order, and Notice of Proposed Rulemaking*, 13 FCC Rcd 24011, ¶ 37 (1998) (subsequent history omitted) ("*Advanced Services Order*"). The Commission did, however, eliminate the requirement that BOCs file their CEI plans with the Commission and obtain approval of the plans before initiating a new or changing an existing intraLATA information service. BOCs have thus posted their CEI plans for their Internet access service, including high-speed internet access using DSL or other broadband technologies. *See, e.g.,* http://www22.verizon.com/about/publicpolicies/cei/ (Verizon's posted CEI plan for Internet access including where Verizon uses Infospeed DSL to provide its own Internet access services); http://www.sbc.com/PublicAffairs/PublicPolicy/CEIplans/82005.pdf (SBC's CEI plan);

In short, the Commission has already concluded that BOC-provided high-speed Internet access service constitutes an information service and the BOCs have treated their provision of that service accordingly.

B. The Transmission Component of High-Speed Internet Service Is a Telecommunications Service

Whereas the Commission's tentative conclusion that ILEC-provided Internet access service is an information service is consistent with Commission precedent and practice, the Commission's tentative conclusion that there is no separable underlying telecommunications service is a dramatic and unwarranted departure from precedent.[10/] The Commission reaches this tentative conclusion by espousing its "view" that wireline broadband Internet access service consists not of two separate services, but a single, integrate offering to end users.[11/]

The Commission does not even acknowledge, however, that this "view" is directly at odds with the Commission's previous holding that a carrier provides two services when it provides high-speed Internet access services – a telecommunications service consisting of advanced services, such as DSL service, and an information service, *i.e.,* Internet access service. The Commission wrote:

> [a]n end user may utilize a telecommunications service together with an information service, *as is the case of Internet access*. In such a case, however, we treat the two services separately: the first service is a telecommunications service (*e.g.,* the xDSL-enabled transmission path),

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http://cei.qwest.com/cei.nsf/c650d8d42cb558f58825675a0072d9bf/550ba0f70ca24fcd88256930005a9a43/$FILE/Internet+Access.pdf (Qwest CEI Plan).

[10/] *Notice*, ¶ 17 (tentatively concluding that "the transmission component of retail wireline broadband Internet access service provided over an entity's own facilities is 'telecommunications' and not a 'telecommunications service.'").

[11/] *Notice*, ¶ 22. *See also Notice*, ¶ 24 ("We believe that the end user is receiving an integrated package of transmission and information processing capabilities from the provider. We believe that the fact that the provider owns the transmission does nothing to change the nature of the service to the end-user.").

> and the second service is an information service, in this case Internet access.[12/]

There is nothing in the Commission's finding to suggest that a different result should obtain when the provider of Internet access is also the owner of the underlying transmission path. In fact, the context of the order makes clear that the finding is fully applicable when, for example, BOCs provide the Internet access service and the underlying xDSL service. This is made clear by the very next paragraph of that Order in which the Commission affirms the obligation of BOCs to unbundle the transmission component that underlies the BOC's own information services. The Commission states, "[w]e note that BOCs offering information services to end users of their advanced services offerings, such as xDSL, are under a continuing obligation to offer competing ISP's nondiscriminatory access to the *telecommunications services* utilized by the BOC information services."[13/]

The Commission's conclusion that carrier-provided broadband Internet access service is comprised of both a telecommunications service and an information service was grounded in a careful analysis of the statutory definitions of information service, telecommunications service and telecommunications.[14/] Indeed, until recently, that had been the position of the incumbent LECs as well. *See, e.g., Report to Congress*, ¶ 100 (citing Bell Atlantic Reply comments arguing that information service providers should be deemed telecommunications carriers). The Commission proffers no explanation for

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12/ *Advanced Services Order*, ¶ 36 (emphasis added) (citing *Independent Data Communications Manufacturers Assoc., Inc. Petition for Declaratory Ruling that AT&T's InterSpan Frame Relay Service Is a Basic Service*, DA 95-2190, *Memorandum Opinion and Order*, 10 FCC Rcd 13717, ¶¶ 40-46 (1995) (subsequent history omitted) ("*Frame Relay Order*")).

13/ *Advanced Services order*, ¶ 37 (emphasis added).

14/ *Advanced Services Order*, ¶ 33.

why it now tentatively reaches a different conclusion reviewing the very same statutory definitions and applying them to the very same services and technologies.

That Internet access service may consist of two separate services is not inconsistent with the Commission's view that, from the end user's perspective, the end user is receiving one service. But this speaks only to the relationship between the Internet access service provider and its customer. As was noted in the *Report to Congress*, there is also a relationship between the Internet access service provider and the entity that provides the telecommunications for that service, even where both entities are within the same company.[15/] In such a case, the entity should be viewed as providing telecommunications service to its affiliated Internet service provider, who in turn may be viewed as providing a single service to the end user customer. *See Report to Congress,* n.138.

C. Stand-Alone BroadBand Service Is a Telecommunications Service

The Commission goes even further and asks whether an entity is providing a telecommunications service to the extent it provides only broadband transmission on a stand-alone basis, without a broadband Internet access service. That the Commission would even ask this question is nothing short of astounding. The Commission has repeatedly held, and even argued before the courts, that advanced services (or what it now calls broadband services) constitute telecommunications services. *See, e.g., GTE Telephone Operating Cos., GTOC Tariff No. 1, GTOC Transmittal No. 1148*, CC Docket No. 98-79, *Memorandum Opinion and Order*, 13 FCC Rcd 22466, ¶ 25 (1998) ("*GTE Tariff Order*") (finding that GTE's DSL service constitutes on interstate special access

service); *Advanced Services Order*, ¶ 35 (holding that "advanced services are telecommunications services"); *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 98-147, *et al.*, *Order on Remand*, 15 FCC Rcd 385, ¶ 9 (1999) ("*Advanced Services Remand Order*") ("we affirm our prior conclusion that xDSL-based advanced services constitute telecommunications services as defined by section 3(46) of the Act."); *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, *Second Report and Order*, 14 FCC Rcd 19237, ¶ 10 (1999) ("*AOL Bulk Services Order*") ("[t]he record reflects, and the parties agree, that advanced services are telecommunications services that predominantly are offered to residential and business end-users and to Internet Service Providers"); *Policy and Rules Concerning the Interstate, Interexchange Marketplace; Implementation of Section 254(g) of the Communications Act of 1934, as amended, et al.*, CC Docket Nos. 96-61, 98-183, *Report and Order*, 16 FCC Rcd 7418, ¶ 46 (2001) ("*CPE/Enhanced Services Bundling Order*") (noting that the provision of DSL service is subject to section 202 non-discrimination requirements). *See also Assoc. for Communications Enters. ("ASCENT") v. FCC*, 253 F.3d 29 (D.C. Cir. 2001) ("As the Commission acknowledged, it had previously determined that advanced services constitute 'telecommunications service'. . ."); *ASCENT v. FCC*, 253 F.3d 662 (D.C. Cir. 2001) (noting that the Commission has determined that advanced services are telecommunications services subject to section 251(c) obligations). Indeed, not even ILECs argued that advanced services did not constitute telecommunications services. *See e.g., Advanced Services Remand Order*, ¶ 9 ("even US West has expressly conceded that

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15/ *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, *Report to Congress*, 13 FCC Rcd. 11501, n.138 (1998) ("*Report to Congress*").

advanced services fall within the broad ambit of telecommunications services."). *Report to Congress*, n.209 (citing Bell Atlantic Reply Comments arguing that Internet service providers should be classified as telecommunications carriers).[16/]

The Commission does not explain what prompted it to open an issue that has been so thoroughly settled. The only hint of what the Commission may have in mind is the follow on discussion of whether the wholesale provision of DSL service to Internet service providers constitutes the offering of telecommunications "directly to the public."[17/] To the extent the Commission suggests that the wholesale offering of telecommunications to a limited class of users is not a telecommunications service, the Commission again is straying from precedent without explanation. The Commission has previously concluded that the provision of DSL services to ISPs for use as an input to the ISP's Internet access service – *i.e.*, a wholesale offering -- constitutes a telecommunications service. *AOL Bulk Services Order*, ¶ 21 ("Moreover, we agree with NTIA that although bulk DSL services sold to Internet Service Providers are not retail services subject to section 251(c)(4), *these services are telecommunications services*, and as such, incumbent LECs must continue to comply with their basic common carrier obligations with respect to these services.") (emphasis added). The Commission correctly recognized that whether a services is sold on a retail basis or as a wholesale offering is not determinative of its status as a telecommunications service. *See Non-*

16/ In its Reply Comments, Bell Atlantic argues "[j]ust because a provider offers a combination of telecommunications and information services does not make its entire offering an information service." *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Bell Atlantic Reply Comments at 8 (Feb. 6, 1998).

17/ *Notice*, ¶ 26.

Accounting Safeguards Order, ¶ 265 ("the term 'telecommunications service' was not intended to create a retail/wholesale distinction . . ..").

The Commission's conclusion is also consistent with the definition of telecommunications service, which the Commission has held is synonymous with common carriage. *AT&T Submarine Systems, Inc. Application for a License to Land and Operate a Digital Submarine Cable System Between St. Thomas and St. Croix,* File No. SCL 94-006, *Memorandum and Order*, 13 FCC Rcd 21585, ¶ 6 (1998) (citing *Cable and Wireless , PLC Application for a License to Land and Operate in the United States a Private Submarine Fiber Optic Cable Extending Between the US and the UK*, File No. SCL 96-005, *Cable Landing License*, 12 FCC Rcd 8516 (1997) ("*Cable and Wireless Order*")), *aff'd, Virgin Islands Telephone Corp. v. FCC*, 198 F.3d 921 (D.C. Cir. 1999). To determine common carrier status, the Commission applies the two-part *NARUC I* test. Under the Commission's application of this test, a carrier does not have to be regulated as a common carrier if (1) it intends "to 'make individualized decisions, whether and on what terms to serve'" or (2) the public interest does not require the carrier to be legally compelled to serve the public indifferently. *Cable and Wireless Order*, ¶¶ 14-15. The essence of common carriage is holding oneself out to provide service indiscriminately to the public.

A carrier however need not offer the service to the entire public at large. Nor must "the public" consist of end users. "[A]n entity may qualify as a common carrier even if 'the nature of the service rendered is sufficiently specialized as to be of possible use to only a fraction of the total population.'" *Non-Accounting Safeguards Order*, ¶ 265 (quoting *NARUC v. FCC*, 525 F.2d 630, 641 (D.C. Cir. 1976) ("*NARUC I*")). A

transmission service offered on a wholesale basis to a discrete category of buyers constitutes a telecommunications service or common carriage as long as the services are offered indiscriminately to that class (or public policy would require such a result). *See Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, *Report and Order*, 12 FCC Rcd 8776, ¶ 785 (1997) (common carriage not limited to end users, "[c]ommon carrier services include services offered to other carriers, such as exchange access service, which is offered on a common carrier basis, but is offered primarily to other carriers.") (citing 47 C.F.R. § 69). The legal conclusion that common carrier status applies whether the entire public is served or only a subset of the public is served is reflected in the statutory definition of "telecommunications service." The Commission has held that the definitional phrases "directly to the public" or "to such classes of users as to be effectively available directly to the public" means, in the first instance, to the public at large, and, in the latter instance, to a subclass of the public, such as ISPs. *See Virgin Islands Telephone Co. v. FCC*, 198 F.3d 921 (D.C. Cir. 1999) ("Given that the statute's distinction between 'directly available to the public' and 'effectively available directly to the public' can be read as reflecting the *NARUC I* court's distinction between serving the entire public and serving only a fraction of the public, it is reasonable to read the statute as adopting the *NARUC I* framework.").

Applying these principles to the incumbent LEC's provision of stand alone broadband services compels a finding, consistent with Commission precedent, that such services are telecommunications services. Incumbent LECs have held themselves out to provide stand alone broadband services, such as DSL service, on an indiscriminate basis. As noted above, incumbent LECs have filed tariffs making such a services available both

on a retail basis to residential and business users, and on a wholesale basis to ISPs. *See, e.g., GTE Tariff Order*, n.29 (noting that GTE's service will be available to ISPs, businesses, IXCs and CLECs); *AOL Bulk Services Orders*, ¶¶ 6-7 (noting that incumbent LECs provide DSL service to residential and business end users and have filed tariff revisions to establish term and volume discount plans for the sale of DSL services to ISPs on a wholesale basis); *Joint Application by SBC Communications Inc, et al., Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region, InterLATA Services in Arkansas and Missouri*, CC Docket No. 01-194, *Memorandum Opinion and Order*, 16 FCC Rcd 20719, ¶¶ 80-83 (2001) (describing SBC tariffed DSL service). By tariffing these services, incumbent LECs have held themselves out to provide DSL service indiscriminately, even if restricted to only to ISPs, and have therefore met the first part of the *NARUC I* test. *Virgin Islands Telephone Co. v. FCC*, 198 F.3d 921 (what is essential is undertaking to serve indifferently, even if only to a fraction of the public).[18/]

The first part of the *NARUC I* test is somewhat tautological. If the ILECs unilaterally decide not to offer DSL service indiscriminately, either on a retail or wholesale basis, theoretically they could avoid common carrier status under the first part of the test. To avoid this result, the second part of the *NARUC I* test requires the Commission to evaluate whether the public interest requires common carrier status. The public interest requires incumbent LECs to continue to provide DSL service on a common carrier basis. In order to ensure that ISPs continue to have access to DSL

[18/] The fact that incumbent LECs have filed tariffs offering to provide DSL service indiscriminately to ISPs distinguishes them from cable companies, which historically have not offered any stand alone transmission service to unaffiliated ISPs.

services as a necessary input to their high-speed Internet access services, incumbent LECs must continue to be required to provide such services indiscriminately to ISPs.

V. COMPUTER II/III REGIME APPLIES TO THE PROVISION OF INTERNET ACCESS SERVICES

The Commission seeks comment on the appropriate regulatory regime for the provision of broadband Internet access service by facilities-based carriers. The Commission asks specifically whether its longstanding rules under the *Computer II/III* cases should continue to apply to broadband Internet access service provided by facilities-based carriers. One assumption underlying the Commission's questions is that the *Computer II/III* rules were designed for analog networks and narrowband applications, not the new world of broadband Internet access post 1996 Act. *Notice*, ¶¶ 31, 47.

The Commission's underlying assumption that the *Computer II/III* regime applies to outmoded, narrowband technologies, and has little, if any, relevance to broadband Internet access services contradicts previous Commission findings. The Commission has long applied the *Computer II/III* rules to new, high-speed technologies, such as packet switching technology. The Commission for example, applied the *Computer II/III* regime to AT&T's frame relay services which it described as "relatively new, high-speed packet-switching technology." *Frame Relay Order*, ¶ 6. Broadband internet technologies, as the Commission has previously found, are simply another form of packet-switched transmission technologies, like frame relay service, to which the *Computer* framework consistently has been applied. *Advanced Services Order*, ¶ 35 ("The Commission has repeatedly held that specific packet-switched services are 'basic services' . . . xDSL and

packet switching are simply transmission technologies"); *Advanced Serviced Remand Order*, ¶ 41.

The Commission suggestion that the 1996 Act somehow rendered the *Computer II/III* framework inapplicable or that the 1996 Act's "statutory-based policy objectives associated with the development of the Internet and the deployment of advanced services"[19/] undermined the vitality of that framework also departs from precedent. The Commission has previously concluded that Congress intended to maintain the *Computer II/III* framework for intraLATA information services when it passed the 1996 Act. *Report to Congress*, ¶ 45 ("looking at the statute and the legislative history as a whole, we conclude that Congress intended the 1996 Act to maintain the *Computer II* framework."); *Non-Accounting Safeguards Order*, ¶ 132 ("We conclude that the *Computer II, Computer III,* and *ONA* requirements are consistent with the 1996 Act, and continue to govern BOC provision of intraLATA information services.").

More fundamentally, there is nothing unique about broadband services to suggest that Congress intended any different treatment of them. This was expressly recognized by the D.C. Circuit when it held that "Congress did not treat advanced services differently from other telecommunications services." *ASCENT v. FCC*, 235 F.3d 662 (D.C. Cir. 2001). Thus, neither the nature of the services nor the passage of the 1996 Act provide any basis for departing from the *Computer II/III* framework.

Moreover, the Commission should not attempt to "import" Title II regulation, including 251(c) obligations, into Title I. The Commission's ancillary jurisdiction is not without limit, and the Commission has traditionally used its ancillary jurisdiction

sparingly. The Commission has been particularly hesitant to impose regulations on information services under Title I. That hesitancy has been an important factor in the development of robust information services markets.[20/] After years of refusing to impose common carrier type regulation on information service providers, the Commission suggests imposing a host of such regulations, and doing so with respect to services which the Commission presumably will have specifically found do not constitute common carriage.

VI. IMPLICATIONS OF THE COMMISSION'S STATUTORY CLASSIFICATIONS ON THE INCUMBENT LECS' OBLIGATIONS TO PROVIDE UNBUNDLED NETWORK ELEMENTS.

The Commission correctly recognizes that its decision on regulatory classifications in this proceeding will have significant implications for incumbent LEC unbundling obligations under section 251(c)(3). In its Triennial Review Comments, NewSouth explained that it is impaired in its ability to provide the services it seeks to offer without continuing access to unbundled high capacity (DS1) local loops and DS1 EELs. NewSouth utilizes these unbundled network elements to provide a bundle of services to its customers, a bundle which often includes high-speed internet access services. It is crucial that NewSouth's ability to continue to obtain access to incumbent LEC network elements not be effectively eliminated through the definitional changes contemplated in this proceeding.

As the Commission recognizes, there are two ways in which the Commission's regulatory classifications could affect NewSouth's ability to obtain UNEs. First, if

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19/ *Notice*, ¶ 35.

20/ *See, generally,* Jason Oxman, *The FCC and the Unregulation of the Internet*, OPP Working Paper No. 31 (July 1999), *available at* http://www.fcc.gov/Bureaus/OPP/working_papers/oppwp31.pdf.

Internet access services are information services, can NewSouth continue to obtain access to UNEs given that UNEs are to be used to provide a telecommunications service? 47 U.S.C. § 251(c)(3) (establishing the duty to provide nondiscriminatory access to UNEs "for the provision of a telecommunications service"). Second, if the incumbent LEC uses the facilities exclusively to provide its own Internet access service, and such service is deemed to be an information service without an underlying telecommunications services, how can those facilities fit within the statutory definition of a network element, which is a "facility or equipment used in the provision of a telecommunications service?" *Notice*, ¶ 61 (quoting 47 U.S.C § 153(29)). These concerns are, of course also implicated by the Commission's resolution of the question of whether stand-alone broadband services are telecommunications services.

A. Carriers Must be Permitted to Provide Both Internet Access and Telecommunications Service Over the Same UNEs.

With respect to the first question, the Commission must reaffirm its conclusion in the *Local Competition Order* that a carrier may provide information services over UNEs so long as they also provide telecommunications service over the same facilities. The Commission has previously held that telecommunications carriers that have obtained interconnection or access to UNEs under sections 251(c)(2) or 251(c)(3) "may offer information services through the same arrangement, so long as they are offering telecommunications services through the same arrangement as well." *Implementation of the Local Competition Provisions in the Telecommunications Act 1996; Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers,* CC Docket Nos. 96-98, 95-185, *First Report and Order*, 11 FCC Rcd 15499, ¶ 995 (1996) ("*Local Competition Order*") (intervening history omitted), *aff'd by AT&T Corp. v. Iowa*

Utils. Bd., 525 U.S. 366 (1999). The Commission held that enabling competitors to provide both information services and telecommunications services over the same interconnection or UNE arrangement furthered the pro-competitive spirit of the 1996 Act. The Commission wrote:

> Under a contrary conclusion, a competitor would be precluded from offering information services in competition with the incumbent LEC under the same arrangement, thus increasing the transaction cost for the competitor. We find this to be contrary to the pro-competitive spirit of the 1996 Act. By rejecting this outcome we provide competitors the opportunity to compete effectively with the incumbent by offering a full range of services to end users without having to provide some services inefficiently through distinct facilities or agreements. *Id.*

These conclusions remain fully applicable today. NewSouth, as explained above, provides a bundle of services to its customers utilizing the same unbundled network elements. These services include telecommunications services (*e.g.,* local and long distance voice services) and, for many customers, high-speed Internet access services using one or more channels on the unbundled DS1 loop. NewSouth could not compete with the incumbent LEC if could not offer at least the same bundle of services that the incumbent LEC could offer. Nor could NewSouth compete if it had to utilize two separate facilities or networks to serve a single customer – one set of elements to provide telecommunications services and another to provide broadband Internet access service. There certainly can be no reasonable policy basis for imposing such inefficiencies. Additionally, it is no answer to say to NewSouth that it can use one set of facilities to provide its bundled offering, but those facilities cannot be obtained as unbundled network elements. This would deprive NewSouth of the ability to use UNEs for a telecommunications service, which is contrary to the 1996 Act. Moreover, such a limitation effectively would require NewSouth to purchase last mile facilities from the

incumbent LEC's special access tariff. NewSouth's Triennial Review comments set forth the harm NewSouth would suffer if relegated to special access services.[21/]

B. Network Elements Used by an ILEC Must Continue to be Subject to Unbundling Obligations

As noted, the Commission also asks how incumbent LECs can be required to provide unbundled access to the facilities used to provide Internet access services if such services are deemed information services without a separable telecommunications service given that the definition of network elements is limited to elements used to provide a telecommunications service. The short answer is that such facilities are used to provide a separable telecommunications service for the reasons explained above.

A contrary finding – that the network elements used to provide broadband Internet access services are immune from section 251(c)(3) unbundling obligations – would be contrary to Congressional intent, as this Commission has already held. It would also constitute an impermissible end run around the statutory prohibition on forbearing from applying those obligations until section 251 is fully implemented.

The BOCs are nothing if not persistent. They have tried one gambit after another to lift unbundling restrictions from broadband technologies. The Commission has squarely rejected these efforts in the past.[22/] In the *Advanced Services Order*, for example, the Commission rejected BellSouth's argument that Congress intended to exclude new technologies from section 251 unbundling obligations. To the contrary, the Commission wrote: "Nothing in the statute or legislative history indicates that [251(c)] was intended to apply only to existing technology. Moreover, Congress was well aware

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[21/] NewSouth Triennial Review Comments at 25-27 (confidential version).

of the Internet and packet-switched services in 1996, and the statutory terms do not include any exemption for those services."[23/] Neither the statute nor the legislative history has changed since the Commission reached these legal conclusions. As the Commission found, Congress unambiguously intended section 251(c)(3) unbundling obligations to apply to new as well as existing technologies.

The Notice also recognizes that the incumbent LECs are likely to provide both telecommunications services and information services over the same facilities (just as NewSouth provides both kinds of services over the same facilities). It thus asks to what extent the incumbent LEC must be obligated to provide unbundled access to "shared-use facilities." *Notice,* ¶ 61. An incumbent LEC should not be permitted to avoid unbundling obligations by adding an information service on its facilities. The Commission has squarely rejected such "contamination" theories. The Commission, for example, has held that facilities-based information service providers (*e.g.,* a BOC providing an information service over its own facilities) cannot avoid the *Computer II* and *Computer III* obligations to provide access to basic services by bundling information and transmission services (or enhanced and basic) services. *Frame Relay Order,* ¶¶ 43-45. As the Commission noted, application of the so-called contamination theory to facilities-based carriers would result in the circumvention of the unbundling requirements of *Computer II/III*. *Id.*, ¶ 44; *see also Report to Congress*, ¶ 60 ("It is plain, for example, that an incumbent local exchange carrier cannot escape Title II regulation of its residential local exchange service by packaging that service with voice mail.").

[22/] The Commission has excluded packet switching equipment from unbundling obligations – but not loops or other bottleneck facilities.

[23/] *Advanced Services Order*, ¶ 49 (citing *Frame Relay Order*, ¶¶ 40-46).

Similarly, application of a "contamination-type" theory to an ILEC's unbundling obligations would eviscerate section 251(c)(3) and encourage the worst type of game playing as incumbent LECs load information services onto facilities simply to avoid unbundling obligations. (A holding that incumbent LECs could avoid 251(c)(3) obligations if facilities are *only* used to provide high-speed Internet access service would encourage inefficient investment as carriers developed duplicate networks in order to avoid their statutory duties under section 251(c)).

C. Excusing ILECs from the Statutory Unbundling Obligations Through Definitional Changes Would Constitute an Impermissible Attempt to Forebear

The Commission previously sought to lift 251(c) obligations related to broadband services by permitting incumbent LECs to establish separate affiliates that were presumed not to be successors or assigns of the incumbent as long as certain structural and transactional safeguards were met. *See ASCENT v. FCC*, 235 F.3d 662 (D.C. Cir. 2001). The *ASCENT* Court held that the Commission's effort amounted to a circumvention of the statutory scheme because it effectively resulted in forbearance of 251 obligations. *ASCENT*, 235 F.3d at 666. The Court concluded that there was no basis for effectively forbearing from applying 251 obligations to advanced services. It specifically rejected SBC's argument that it was appropriate to deregulate advanced services offered through a separate affiliate because incumbent LECs have no market power in the provision of advanced services. The Court rejected that argument, regardless of its merits, because Congress had clearly made a different determination. As stated by the Court, "Congress did not treat advanced services differently" and thus there was no basis to ignore the statutory scheme which precluded 251 forbearance. *ASCENT*, 235 F.3d at 668.

Having failed in their effort to obtain forbearance from 251 obligations for advanced services through a separate affiliate structure, the incumbent LECs now seek to convince the Commission to obtain the same result by reversing long standing precedent that advanced services are telecommunications services. The result predictably will be the same as the Commission's attempt to establish a separate advanced services affiliate. The Commission cannot make an end run around the restrictions on forbearing from section 251 through the artifice of definitional changes.

CONCLUSION

The Commission cannot blind itself to precedent in the pursuit of "regulatory parity." Nor should it undermine the incumbent LEC's statutory unbundling obligations that have enabled carriers such as NewSouth to bring broadband services to consumers. The Commission should thus affirm that high-speed transmission services constitute telecommunications services, whether those services are bundled with Internet access services or provided on a stand-alone basis.

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May 3, 2002

CERTIFICATE OF SERVICE

I, Alexandria Jungkeit, hereby certify that on this 3rd day of May 2002, I caused a copy of the foregoing Comments of NewSouth Communications to be filed on ECFS, and a copy to be served by hand delivery or electronic transmission(*) on the following:

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